Hearing Statement

Submitted by

Neil A. G. McPhie, Chairman

U. S. Merit Systems Protection Board

"Justice Delayed is Justice Denied:
A Case for a Federal Employees Appeals Court"

Subcommittee on the Federal Workforce and

Agency Organization

Committee on Government Reform

United States House of Representatives

The Honorable Jon Porter
Chairman

The Honorable Danny K. Davis
Ranking Member

November 9, 2005

Good morning Chairman Porter, Ranking Member Davis, and Members of the Subcommittee.

My name is Neil McPhie and I have the honor of serving as Chairman of the U.S. Merit Systems Protection Board. Thank you for the opportunity to appear before you to testify about the proposal to establish a Federal Employees Appeals Court.

The materials prepared by the Senior Executives Association identify two main reasons for consolidating the existing complaint, appeals, and grievance processes into a single system administered by a Federal Employees Appeals Court. The first reason given is that the current system is complex and confusing, in that personnel actions can be challenged before multiple bodies that apply different law. The second reason given is that, under the current system, it takes too long to resolve challenges to personnel actions. I believe that the second reason, delayed resolution of disputes, is the greater concern, although I respectfully suggest that the offered solution, a Federal Employees Appeals Court, requires further study.

As to the first main reason for establishing a Federal Employees Appeals Court, it appears that managers who view the current system as too complex and confusing are primarily responding to the multiplicity of laws and regulations that govern the federal employment relationship, and not the fact that there are multiple avenues available for challenging personnel actions. Without trying to provide an exhaustive list, I would point out that an employee could claim that a single personnel action was improper for any or all of the following reasons: It was not taken for the efficiency of the service; it was discriminatory; it was taken in retaliation for the employee's whistleblowing; it violated a collective bargaining agreement; it constituted an unfair labor practice; it violated employee protections set out in the Uniformed Services Employment and Reemployment Rights Act; it violated veterans' preference rules; or it violated classification rules.

Under the current system, each of the claims I have just described could be considered by a different body, or in some instances an arbitrator, with a specialized

role in the federal employment dispute-resolution system. Nevertheless, all of the claims could still be made if those bodies were combined into a single entity. My point is that insofar as day-to-day management of the federal workforce is concerned, complexity is an outgrowth of the numerous, detailed rights that policymakers have conferred on civil servants. In general, the perceived complexity of the current system does not seem to be directly caused by the availability of multiple avenues for review of personnel actions.

In this connection, I would point out that the current system has safeguards intended to prevent inconsistent decisions. For example, by statute, an employee who believes that a personnel action was taken against him because of his whistleblowing must make a binding election among three possible review mechanisms: A grievance; a direct appeal to the MSPB; or a complaint for corrective action before the Office of Special Counsel. A choice of any one of these avenues forecloses the other two. To take another example, an action that is pursued to a final grievance decision that is reviewable by the Federal Labor Relations Authority is excluded from MSPB jurisdiction, and conversely, an action that is appealable to the MSPB is excluded from FLRA jurisdiction. Without going into further examples, I would simply observe that the current system is not designed to reach inconsistent decisions.

As to the second main concern identified by the Senior Executives Association, lengthy delays in resolving challenges to personnel actions, I would say that a typical non-mixed case – that is, a case which does not involve a claim of discrimination – moves through the administrative system fairly quickly. After an action is taken, the employee must appeal to the MSPB within 30 days. In fiscal year 2005, the MSPB's administrative judges issued decisions in an average of 92 days. In more than half of the cases that are filed with the MSPB, neither party requests further administrative review, meaning that the administrative judge's decision becomes the final administrative decision on the personnel action. Based on FY05 figures, on average it takes no more than 122 days from the date of the personnel action to this final administrative decision.

Of course, not every case ends that quickly. Either party may seek review of the administrative judge's decision before the full MSPB, and the Board members are striving to decide cases on average within 120 days. While the full MSPB is not there yet, the trends at headquarters are positive. In fiscal year 2005 the Board reduced its pending headquarters inventory by 38%, from 955 cases to 593 cases; a smaller inventory means that newly-filed cases will be decided more quickly. The MSPB is firmly committed to reducing its processing time as the new Department of Homeland Security and Department of Defense appeals systems go into effect, although as I have stated in the past before this same committee, the MSPB will treat cases from all agencies equally. Assuming that the full MSPB can decide cases within an average of about 120 days, in a typical case the total time from the date the personnel action was taken until a final, judicially reviewable administrative decision is rendered should be about 277 days, or about nine months.

Another underlying concern with regard to lengthy delays is the "mixed case" process, where there is an appeal from an action that is both within the MSPB's jurisdiction and that the employee believes was discriminatory. If the employee chooses to pursue every step in the process, and if each step is completed within regulatory timeframes, then approximately 695 days, or nearly two years, will have passed before administrative review is complete. It is not for me, as the head of an independent, non-policy-making agency, to say whether this is an unacceptably long time. Determining what constitutes appropriate case processing timeframes remains a speculative and subjective matter ripe for debate. The proposal from the Senior Executives Association would significantly modify the procedures by which discrimination claims are decided. These established procedures evolved as a result of the civil rights movement, a long struggle that reshaped the course of our great nation. I would hope that policymakers exercise great caution when studying ways to modify procedures for asserting discrimination claims.

In conclusion, it is possible that streamlining benefits may be achieved by consolidating current dispute-resolution bodies into a single Federal Employees

Appeals Court. I would suggest, however, that the efficiencies sought by the Senior Executives Association could possibly be gained by reforming the current system. An appropriate course might be to form a task force of the stakeholders to study possible changes and work to resolve perceived inefficiencies in the current system. The MSPB would be pleased to assist any such task force with its work. Again, thank you for the opportunity to participate in this hearing and I will be happy to respond to any questions you might have at this time.